(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CRIMINAL APPEAL NO. 1087 /2002

APPELLANT : Harishankar Gupta, S/o Late Kartik Ram Gupta, aged 38 years, R/o Village Takhatpur, Dhobipara, Police Station Takhatpur, District Bilaspur (C.G.) present address – Quarter no. H-18, SADA Colony, Korba, Chowki – Rampur, Police Station Kotwali, Korba, District Korba (C.G.)

3960

Filed on 17/10/2002

by Shri A. K. Prasad Advocate

R. to D. R. (J)

17/10

-VERSUS-

RESPONDENT : State of Chhattisgarh through Station House Officer, Chowki Rampur, Police Station, Kotwali, Korba District Korba (C.G.)

CRIMINAL APPEAL U/S 374 (2) OF THE CODE OF CRIMINAL PROCEDURE .

A.I.R

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Criminal Appeal No.1089 of 2002

Harishankar Gupta

- Versus -

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge
7.1.2007

HON'BLE SHRI JUSTICE SUNIL KUMAR SINHA

Sd/-
SUNIL KUMAR SINHA
Judge
9-1-2007

POST IT FOR PRONOUNCEMENT OF JUDGMENT ON 10TH JANUARY, 2007

Sd/-
L.C.BHADOO
Judge

(38)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1089 of 2002

Harishankar Gupta

- Versus -

State of Chhattisgarh

Present: -

Mr. V.C. Ottalwar, Advocate: For the appellant.

Mr. U.N.S. Deo, Addl. Public Prosecutor with Mr. Ravindra Agarwal, Panel Lawyer For the State/respondent.

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO, AG. CHIEF JUSTICE

& HON'BLE MR. SUNIL KUMAR SINHA, J

J U D G M E N T

(Delivered on 10th January, 2007)

Following judgment of the Court was delivered by *L.C. Bhadoo, Ag. Chief Justice*:-

1. By this appeal under Section 374(2) of the Cr.P.C accused/appellant-Harishankar Gupta has questioned the legality & correctness of judgment dated 9th October, 2002 passed by 3rd Additional Sessions Judge (Fast Track Court), Korba in Sessions Trial No.33/2000, whereby the Additional Sessions Judge, after holding the accused/appellant guilty for commission of offence under Section 302 of the Indian Penal Code, for committing murder of his first wife Usha Gupta, sentenced him to undergo imprisonment for life and to pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 3 months.

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2. The prosecution story, in brief, is that on 15.9.1999, accused Harishankar Gupta gave a merg intimation to the Police Outpost Rampur of Police Station Kotwali, Korba to the effect that he is residing in House No.H-18, SADA Colony, Korba, in the intervening night of 14th & 15th September, 1999, he along with his wife Usha Gupta went to watch a movie and after returning from the movie they went for sleep. In the morning at about 7.00 a.m., he tried to woke up his wife but she was found dead. This report was registered at Sr. No.0/99 of the out post and thereafter, it was sent to the Police Station Kotwali, Korba where Merg No.128/99 was registered. The Investigating Officer left for the scene of occurrence, after giving notice (Ex.P-3) to the Panchas including the accused/appellant, prepared the inquest (Ex.P-4) on the body of Usha Gupta. Body of Usha Gupta was sent for postmortem examination to the Government Hundred Bed Hospital, Korba under Ex.P-5, where Dr. R.K. Divya (PW-9) conducted the postmortem, prepared the report (Ex.P-6) and opined that the cause of death was asphyxia as a result of strangulation. Ornaments of the deceased, which were sent by the hospital, were seized under Ex.P-8. Site plan (Ex.P-10) was prepared by the Patwari. Letters (Articles 1 to 11) written by deceased Usha Gupta to Parwati Padamwar (PW-19) were seized from Parwati Padamwar under Ex.P-11. Based on the postmortem report, F.I.R. (Ex.P-13) was registered on 23.9.1999 for commission of offence punishable under Sections 302 & 201 of the Indian Penal Code. While in police custody, the accused gave memorandum (Ex.P-1) regarding the place where he kept the wood like scale about one feet in length, in pursuance of that he got recovered one wood like scale under Ex.P-2. The same was sent to the doctor (PW-9) for his opinion under Ex.P-9 and the doctor gave his opinion vide

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Ex.P-7 that it was possible to press the neck of deceased by the said wood.

3. After completion of usual investigation, charge sheet was filed against the accused/appellant in the Court of Chief Judicial Magistrate, Korba, who in turn committed the case to learned Sessions Judge, Bilaspur from where the Additional Sessions Judge, Korba received the case on transfer for trial. The prosecution in order to prove the offence against the accused/appellant examined as many as 19 witnesses. The Additional Sessions Judge recorded the statement of accused/appellant under Section 313 of Cr.P.C., in which he denied the material appearing against him in the prosecution evidence, pleaded innocence and stated that he has been falsely implicated in the crime. He further stated that deceased Usha and his second wife namely Jayshree used to quarrel and he has not done anything. Two defence witnesses namely Jayshree (DW-1) & Naresh Kumar (DW-2) were also examined.

4. Learned 3rd Additional Sessions Judge after hearing the arguments of counsel for respective parties and after perusal of records, convicted & sentenced the accused/appellant, as aforementioned.

5. We have heard Mr. V.C. Ottalwar, learned counsel for the appellant; Mr. U.N.S. Deo, Additional Public Prosecutor with Mr. Ravindra Agarwal, Panel Lawyer on behalf of the State/respondent and carefully perused the record and judgment of the trial court.

6. Mr. Ottalwar, learned counsel for the accused/appellant has not disputed the homicidal death of Usha Gupta. Apart from that, PW-9 Dr. R.K. Divya has stated in his evidence that on 15.9.1999 he was working as Assistant Surgeon in the

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Government Hospital, Korba, on that day, dead body of Usha Gupta was sent to him by the Police Station Kotwali, Korba for postmortem examination. He conducted postmortem examination. Mouth of Usha Gupta was closed, her tongue was between the teeth, blood was coming out from the mouth, she was wearing necklace, she was also wearing a locket tied by silk colour thread, there was a ligature mark in the size of 2½cm x 5cm brown in colour, on cut clotted blood and haemorrhage was noticed. There were marks of postmortem liquidity, there were scratch marks on the neck obliquely placed in the size of 3x1 cm. Above injuries were anti mortem in nature, in his opinion the cause of death was asphyxia as a result of strangulation and same was between 12-14 hours. He has further stated that he also examined the scale like wood and in his opinion it was possible to press the neck of deceased from that wood. Moreover, PW-15 Arjun Singh, Sub Inspector, Police Station Kotwali, Korba has stated that at the time of preparation of inquest (Ex.P-3) on the body of Usha, it was noticed that there was blood on the eyebrow & chin and the blood was oozing out of the mouth. Therefore, in view of above evidence of Dr. R.K. Divya (PW-9) & Sub Inspector Arjun Singh (PW-15), it is established that the death of Usha Gupta was homicidal in nature.

7. As far as involvement of the accused in commission of crime in question is concerned, in this case there is no direct or ocular evidence, whole case rests upon the circumstantial evidence and for resting the conviction solely based on the circumstantial evidence, the law laid down by the Hon'ble Apex Court in the matter of **Dhananjoy Chatterjee Vs. State of W.B.** reported in **(1994) 2 SCC 220** is that;

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> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

In this case the prosecution has tried to establish the involvement of accused in crime in question on the following circumstances;

1. That, deceased Usha Gupta was the first wife of accused, the accused brought second lady namely Jayshree, both the ladies started quarrelling, on account of quarrel between them, accused used to beat Usha that is why the accused wanted to eliminate Usha, as such, the accused had motive to eliminate Usha Gupta.

2. That, just before the death of Usha Gupta, she was seen alive in the company of accused in his house in the fateful night, on the next day morning Usha Gupta was found dead and as per medical report death of Usha Gupta was homicidal.

CIRCUMSTANCE NO.1;

8. As far this circumstance is concerned, it is an admitted position that Usha Gupta was married to accused Harishankar in the year 1980 and she was issueless. As,

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Usha Gupta was issueless, there was some dispute between accused & Usha Gupta, therefore, she started residing with her parents at Aarang. In the year 1988, accused brought Jayshree as his second wife, Jaishree gave birth to a female child. Usha Gupta filed the proceedings against the accused under Section 125 of Cr.P.C. at Raipur, accused went to Usha Gupta, persuaded her to settle the matter, persuaded her that he is ready to take her to his residence, as a result of which the matter was compromised, Usha Gupta withdrew the proceedings filed against the accused. About 2½ years prior to the date of incident the accused brought Usha Gupta to his residence at Korba and since then the accused, Usha Gupta and second lady Jayshree, all three were residing together. The evidence to this effect has been given by PW-3 Nirmala Adhariya, who has stated that her house is in front of the house of accused. The accused was having two wives, accused used to harass Usha, he threatened Usha many times to finish her. Usha used to quarrel for her rights with Jayshree. In the morning of a day in September, 1999 at about 7.00 a.m. she came to know about the death of Usha. 5-6 months prior to the date of incident, Usha disclosed to her that her husband is harassing her and he does not like her. She has further stated that he saw the accused beating Usha on the road and at the gate of the house. In the cross-examination, she has stated that Jyoti, daughter of Jayshree was 6-7 years old. Usha came to the house of Harishankar 2½ years prior to her death. She saw the quarrel between Jayshree & Usha, both of them used to say each other that she is grabbing her right. Usha disclosed this fact in front of 4-5 ladies. Usha also discloses to her that accused has brought second wife keeping her in dark. Accused had beaten Usha once one year before the date of incident, thereafter 5 months before the death and at that

time Jayshree was in the house. In the fateful night she saw the accused & Usha strolling, 5-6 days prior to that Jayshree went to her parents' house. In the evening of fateful night, she saw Usha coming towards the house of Gupta Ji carrying in her hands two Sarees & bangles, on enquiry she informed that same were given by her husband.

9. PW-5 Smt. Sunetri Singh has also corroborated the above evidence of PW-3, Nirmala Adhariya and stated that her house is at the distance of 4-5 houses from the house of accused. Earlier they used to visit the house of each other but since last one year they have stopped visiting the house of each other. Accused was having two wives, their names were Usha & Jayshree. Usha was married, but how Jayshree was residing with the accused she does not know. In the cross-examination this witness has stated that Usha used to come to her house and tell that accused was beating her. At the time of incident, Jayshree went to her parental house. On the fateful night, Usha came to her house and disclosed her that she and her husband are going to watch movie. She also disclosed that her husband has brought Sarees & Bangles for her. PW-6 Smt. Meena Gupta has also stated that she is residing near the house of accused, how Usha died she does not know, but Usha, as and when come to her, used to tell her that her husband was beating her. She heard that Usha was murdered. PW-10 Smt. M. Gupta, who is sister-in-law of the deceased, has stated that Usha was married to accused 16-17 years back. After marriage accused used to quarrel with Usha, therefore, Usha left the house of accused and started residing at Aarang. She used to say that she would not go to her husband. She had filed a maintenance proceeding at Raipur against the accused and during that period accused desired to take Usha with him.

Thereafter, 2-3 times the accused came to Aarang to take Usha. The matter was settled, accused took Usha to his house, but he said that his in-laws will not come to Korba. Once she went to Korba to meet Usha, on which accused started quarrelling with her and asked why they are coming to his house. At that time Usha showed her broken hairs of head and said that accused was in the habit of beating her, as a result of which her hairs were broken. She saw the injury marks also on the body of Usha. When she was returning, the ladies of that vicinity told her not to leave Usha with accused, as he was in the habit of beating her. In the cross-examination she has stated that Usha and second wife of accused used to quarrel. PW-14 Umed Singh, husband of Parwati Padamwar (PW-19), has stated that Usha used to write letters to his wife Parwati, as they were friends and those letters were taken into possession by the police under Ex.P-11. PW-17 Raghunath Das, Head Constable, P.S. Kotwali, Korba has stated that on 9.12.1999 he took into possession the letters, which were written by Usha to Parwati, from Parwati Padamwar under Ex.P-11. PW-19, Parwati Padamwar has also stated that Usha was known to her, when she was residing at Aarang they were visiting the house of each other, when Usha was taken by the accused, she used to write letters to her, which are Articles 1 to 11. Those letters were taken into possession by the police from her.

10. PW-3, Nirmala Adhariya, PW-5 Smt. Sunetri Singh & PW-6 Smt. Meera Gupta, all are independent witnesses, who were residing nearby the house of accused, they have stated that there used to be quarrel between Usha & second wife of accused namely Jayshree, accused used to give beating to Usha and Usha used to disclose this fact to these witnesses. In the cross-examination of these witnesses the defence has

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not been able to elicit any circumstance with discredit their evidence and show that they have deposed against the accused on account of any animosity or on account of interest in the deceased. From their evidence it has come on record that there used to be quarrel between deceased Usha and Jayshree, in that process accused used to give beating to Usha. As Usha was issueless, therefore, Usha & accused used to quarrel on account of which Usha started residing at Arang. When she filed maintenance proceeding against the accused, as the accused was not in a position to face the proceeding and give separate maintenance to Usha, in a deceitful manner he persuaded Usha to withdraw the proceedings on the assurance that he will take her back with him. The poor lady withdrew the proceeding, started living with the accused 2½ years before the date of incident. After arrival of Usha in the house of accused, there used to be quarrel between Usha & Jayshree and perhaps in order to get rid of from day-to-day problem, the accused thought it proper to eliminate Usha, that is why about a week earlier Jayshree left to her matrimonial home and on the fateful day just to keep Usha in a happy mood the accused first gave her Sarees & Bangles, thereafter took her to movie and in the night after returning from the movie he eliminated her. As such, the accused was having motive in his mind to eliminate Usha because of day-to-day quarrel between two wives. Further perusal of letters (Articles 1 to 11) written by Usha to Parwati Padamwar (PW-19) show that Usha used to write this witness that accused used to beat her.

11. Learned counsel for the accused/appellant argued that there is no evidence to show that these letters were written by deceased Usha to PW-19 Parwati Padamwar, there were no signatures of Usha on few letters, but considering the

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letters and the evidence of PW-19 Parwati Padamwar, her husband namely Umed Singh (PW-14) that letters (Articles 1 to 11) were written by Usha, we are of the considered opinion that the argument advanced by learned counsel for the accused/appellant has no merit. In view of the above, it is established that accused was having motive to finish Usha.

CIRCUMSTANCE NO.2: -

12. As far as this circumstance is concerned, from the evidence of PW-3 Nirmala Adhariya, PW-5, Smt. Sunetri Singh, PW-6, Smt. Meera Gupta, it is established that a week's back Jayshree had already left the house of accused, as she went to her parental house and in the evening of fateful night these witnesses saw the accused and Usha strolling, Usha came to them and stated that she along with her husband is going to watch the movie and her husband has brought Sarees & bangles for her. Even the accused & Jayshree have admitted that a week's back Jayshree went to her parental house. Therefore, in the fateful night in the house only the accused & Usha were there, they returned to house after watching second show of movie in the night and went for sleep in the house. Even otherwise, as per postmortem report (Ex.P-6) there was a ligature mark on the neck and haemorrhage on the body of Usha and she was murdered by strangulation. As per inquest report (Ex.P-3) blood spots were present on the eyebrow & chin of Usha, whereas, the accused gave merg intimation in the Police Outpost, Rampur of P.S. Kotwali, Korba that after returning from picture he along with his wife went for sleep, in the next morning he tried to woke up his wife but she was found dead. Therefore, a total false report was given by the accused in the police station because as per postmortem & inquest reports, it is established that Usha was murdered by strangulation. Even,

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the accused did not inform about the blood on the face of Usha and also on the pillow cover.

13. Learned counsel for the accused/appellant argued that as far as inquest report (Ex.P-3) and blood spots found on the body of Usha are concernred, in this regard no question was put to the accused under Section 313 of Cr.P.C., therefore, same cannot be used against the accused and for that purpose he placed reliance on the judgments of the Hon'ble Apex Court in the matters of **Kaur Sain Versus The State of Punjab** reported in **1974 Supreme Court Cases (Cri) 179** and **Zwinglee Ariel Vs. State of Madhya Pradesh** reported in **AIR 1954 S.C. 15.** In Kaur Sain's case the Hon'ble Apex Court held that "*accused was not examined on one aspect and prosecution relying on that aspect. It is open to the accused to plead failure of Magistrate to examine him on that point.*" In Zwinglee Ariel's case the Hon'ble Apex Court held that '*circumstances appearing against accused should not be considered unless opportunity is given to accused for explaining them in his examination.*" The principle laid down the Hon'ble Apex Court in above matters cannot be disputed but in this regard perusal of statement of accused under Section 313 of Cr.P.C. shows that Questions No.102, 103, 104, 105, 106, 107, 108, 109 & 110 were put to him and in answer to those questions, he simply said that he does not know. All these questions were regarding inquest report prepared by Sub Inspector Arjum Singh (PW-15). Perusal of notice (Ex.P-3) given to the Panchas under Section 175 of Cr.P.C. before preparation of inquest report shows that this notice was also given to the accused, his name appears at Sr. No.4 and this notice & inquest report bear the signatures of accused. Therefore, the argument of learned counsel for the appellant that regarding inquest no question was put to the

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accused, therefore, same cannot be used against the accused is contrary to the record and as such, the same is devoid of any merit.

14. As far as merg intimation given by the accused/appellant to the Police Outpost, Rampur is concerned, even though that merg intimation has not been tendered into evidence, but F.I.R. (Ex.P-13) shows that merg intimation was given by the accused, same was reproduced in the F.I.R. PW-15 Sub Inspector Arjun Singh has categorically stated that on 15.9.1999 accused gave merg intimation to him, which he entered at Sr. No.0/99, based on that merg intimation, Merg No.128/99 was registered in the Police Station Kotwali, Korba. The question to that effect was put to the accused during recording of his statement and his reply was that he does not know. Therefore, we do not find any merit in this argument of learned counsel for the accused/appellant.

15. Learned counsel for the accused/appellant argued that DW-1 Jayshree & DW-2 Naresh Kumar, brother of Jayshree, have stated that in the fateful night when they came to house of accused from Seepat, the accused & deceased were not at the residence, as there was a second key with Jayshree, therefore, she opened the door of house and entered the house. When they were sleeping in the house, accused & deceased returned in the night. On seeing them in the house, Usha started quarrelling with Jayshree by saying that when she went to her parental house for one month, then why she returned back within a week. On which, Jayshree replied that as her brother was suffering from stomach pain, she has come along with him to get him examined from a Chhuri Baiga and they are going to that Baiga in the early morning at 4 am. Therefore, apart from accused & deceased, Jayshree & her brother were also present in the house, even

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some quarrel took place between Jayshree & deceased, as such, the prosecution has failed to establish that the accused was the only person in the house. He would submit that the accused has been able to make out a reasonable & probable defence that in the fateful night Jayshree, second wife of accused, and her brother were also present in the house and there was quarrel between Jayshree & Usha, therefore, there was every possibility that Jayshree might have committed the murder of Usha, this probable defence of accused cannot be brushed aside. The trial court has not correctly appreciated the evidence of Jayshree and her brother, their evidence has been brushed aside without assigning any valid reason. As per settled law, the evidence of defence witnesses must be evaluated and scrutinized with equal weightage of prosecution evidence and for this purpose learned counsel placed reliance on the judgment of Hon'ble Apex Court in the matter of **Dudh Nath Pandey Versus State of Uttar Pradesh** reported in **1981 Supreme Court Cases (Cri) 379**. In this judgment the Hon'ble Apex Court held that "*defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses.*" There cannot be two opinions about the above principle of law that the evidence of the defence witnesses has to be scrutinized with due weightage. The Hon'ble Apex Court in matter of **Aher Raja Khima Vs. State of Saurashtra** reported in **A.I.R. 1956 S.C. 217** held that "*...when an accused person offers a reasonable explanation of his conduct, then, even though he cannot prove his assertions, they should ordinarily be accepted unless the circumstances indicate that they are false.*"

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16. Learned counsel for the appellant placing reliance on the judgment of Hon'ble Apex Court in the matter of **Dr. S.L. Goswami Vs. The State of Madhya Pradesh** reported in **AIR 1972 Supreme Court 716** argued that primarily the burden is on the prosecution to establish the ingredients of the offence, and even if the onus shifts upon the accused and the accused has to establish his plea, the standard of proof is not the same as that which rests upon the prosecution. Where the onus shifts to the accused, and the evidence on his behalf probabilises the plea he will be entitled to the benefit of reasonable doubt. Another decision relied upon by learned counsel for the accused/appellant is **Harbhajan Singh Vs. State of Punjab and another** reported in **AIR 1966 Supreme Court 97** in which the Hon'ble Apex Court held that "*...where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. This, however, is the test prescribed while deciding whether the prosecution has discharged its onus of proving the guilt of the accused. It is not a test, which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where he is called upon to prove that his case falls under an Exception, law treats the onus as discharged if he succeeds in proving a preponderance of probability. As soon as the preponderance of probability is established the burden shifts to the prosecution, which still has to discharge its original onus. Basically, the original onus never shifts and the prosecution has, at all stages of the case, to prove the guilt of the accused beyond a reasonable doubt.*"

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17. Applying the above principle of law, it has to be seen that whether the accused has been able to raise probable & reasonable defence by leading evidence or otherwise and thereby ,accused has discharged the burden basedon the principle of preponderance of probability about his innocence. If we examine the evidence of prosecution as also the defence evidence, it is an admitted position that DW-1-Jayshree, second wife of accused left the house about 5-7 days prior to the date of incident. PW-3 Nirmala Adhariya & PW-5 Smt. Sunetri Singh have categorically stated that in the evening of fateful night they saw the accused & deceased strolling, deceased came to them and informed that her husband has brought two Sarees & bangles for her, today they are going to watch the movie. Even in merg intimation and other evidence the accused has stated that he and deceased went to watch cinema, they returned in night about 12 and thereafter, they went for sleep. Accused has nowhere stated either in his statement under Section 313 Cr.P.C. or in the merg intimation or defence has not been able to bring on record by cross-examining the prosecution witnesses that in the fateful night Jayshree also came in the house. When the accused himself has not stated anywhere that Jayshree came to his house in the fateful night, how the evidence of Jayshree, who was having inimical relations with the deceased, can be believed. Had Jayshree and her brother Naresh came in the house in the fateful night, Jayshree quarreled with the deceased and if that was the true fact, then the accused ought to have mentioned the same in the merg intimation or in his statement under Section 313 Cr.P.C. or prosecution witnesses ought to have been cross-examined on that aspect. Therefore, this appears to be an after-thought. Moreover, Jayshree has stated that she came in the fateful night to show his brother Naresh to

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Baiga, as he was suffering from stomach pain, but that Baiga has not been examined. In order to substantiate or support the evidence of Jayshree that she and her brother, in fact, went to that Baiga, some sort of evidence supporting the evidence of Jayshree must have been adduced by the defence. It is not denying fact that Jayshree & Usha being two wives of accused used to quarrel, they used to quarrel by saying each other that she is grabbing her right, in such circumstance, when murder of Usha was committed, it was but natural for Jayshree to depose in favour of her husband to save him from the punishment of murder. As has been mentioned earlier, if that was the true fact, then why the accused while giving merg intimation to the police has not mentioned about that fact. Therefore, the accused has not been able to raise a plausible, reasonable defence to show that in the fateful night apart from the accused some other persons were also present in the house. On the contrary, in this respect the provisions of Section 106 of the Indian Evidence Act are against the accused. As per provisions of Section 106 "*when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*" Therefore, in view of the above provisions it was the duty of accused to give true and correct information to the police about the presence of Jayshree when he gave the merg intimation.

18. As has been mentioned earlier that as per postmortem report the cause of death was strangulation, blood was found on the eyebrow, chin, blood was also oozing out of the mouth, blood was also seen on the pillow cover, a ligature mark was found on the neck, scratch injuries were found and all these things were so visible, but even then the accused without mentioning these things gave a false merg intimation in the

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police outpost that in the morning at about 7 am when he tried to woke up his wife Usha, she was found dead, whereas, she was murdered and that fact was suppressed by him. How that murder was committed, no explanation whatsoever has been offered by the accused, whereas, as per Section 106 of the Evidence Act, the burden was on the accused to explain how and in what circumstances murder of his wife Usha was committed. Merely, remaining silent does not discharge the burden, which was on the accused. No doubt, in a criminal case initially the prosecution was required to establish the ingredients of offence and then burden shifts on the accused to discharge his burden by cross-examining the prosecution witnesses or by adducing his evidence to show that how the murder of deceased was committed. The prosecution was able to discharge its burden, whereas, the accused was not able to discharge his burden, which was on him, as per provisions of Section 106 of the Evidence Act. In this respect the latest two judgments of Hon'ble Apex Court clarify the position. In the matter of **Trimukh Maroti Kirkan Vs. State of Maharashtra** reported in **2006 AIR SCW 5300** interpreting the provisions of Section 106 of the Evidence Act, the Hon'ble Apex Court held that:

> "…. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Court. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see

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that a guilty man does not escape. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of S.106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation. In case of no explanation or false explanation it would because an additional link in chain of circumstances."

19. In the present case, accused has not offered any explanation that how and in what circumstances murder of his wife Usha was committed in his house, rather he has given false explanation, therefore, this is an additional link in the chain of circumstances against the accused. Even though by producing his second wife Jayshree and her brother Naresh, the accused tried to create false defence but that has not been established, as discussed above. Even the accused has not given any explanation regarding the injuries received by Usha.

20. In another recent judgment of the Hon'ble Apex Court in the matter of **State of Rajasthan Vs. Kashi Ram** reported in **2006 AIR SCW 5768** while interpreting Section 106 of the Evidence Act the Apex Court held that:

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> "whether an inference ought to be drawn under Section 106 is a question which must be determined by reference to facts proved. It is ultimately a matter of appreciation of evidence and, therefore, each case must rest on its own facts. The respondent, accused having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by S. 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.

The Court further held that:

> "...The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd's case reported in **AIR 1960 Madras 218.**

21. In the instant case also the accused has not thrown any light as to how Usha was strangulated, how she received injuries,

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when only Usha & accused were occupying the house. Till late night about 12 they were waking-up, as they returned after watching second show of cinema and thereafter they went for sleep. In the next morning Usha was found dead, as she was murdered.

22. In view of the above, we are of the considered opinion that the prosecution has been able to establish the involvement of the accused in crime in question beyond reasonable doubt based on the circumstantial evidence that unerringly point towards the guilt of accused, whereby an irresistible conclusion can be drawn that the accused was the author of crime in question and there was no possibility of innocence of accused. The trial court has not committed any illegality or irregularity in arriving at a decision holding the accused/appellant guilty for commission of offence under Section 302 of the IPC.

23. In the result, the appeal is without merit, same is liable to be dismissed and it is accordingly dismissed.

Sd/-
Acting Chief Justice

10-1-2007

Sd/-
SUNIL KUMAR SINHA
Judge

10-1-2007

Roshan/-